175 (4)

No. 10-470

NOV 15 2010

IN THE

Supreme Court of the United States

LAWRENCE RUSTON, JANET RUSTON,

Petitioners,

— *v.* —

THE TOWN BOARD FOR THE TOWN OF SKANEATELES, PAUL "BILL" PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, THE PLANNING BOARD FOR THE TOWN OF SKANEATELES, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN, ROBERT LOTKOWICTZ, THE VILLAGE OF SKANEATELES, JOHN DOE, JANE DOE 1-20,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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November 16, 2010

PETITIONERS' REPLY MEMORANDUM

They surely do not mean to, but, through their opposing briefs, the Respondents buttress Petitioners' argument for a writ of certiorari. For they themselves cannot agree on the answer to the simple question at the core of our petition: Did *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), overrule *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)?

The Town Respondents brook no doubt. They are sure that *Olech* belongs to the past. They have ascertained that *Iqbal* "modified" *Olech* so to rob it of any precedential power as to class-of-one equal protection pleading. (Town Respondents' Brief in Opp. pp. 2-3).

True, the Town Respondents cannot point to explicit language in *Iqbal* (or subsequent decisions by this Court) that addresses *Olech*'s current vitality. Nor can the Town Respondents deny the value this Court has consistently placed on both *stare decisis* and clarity on those occasions when *stare decisis* must yield to changed conditions or improved understanding. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (*Conley*'s "'no set of facts' language" "has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on

an accepted pleading standard."). Nonetheless, the Town Respondents are emphatic: *Olech* died when *Iqbal* was born. (Town Respondents' Brief in Opp. p.3).

The Village Respondent, in contrast, is flush with uncertainty. While emphatic that *Olech*'s status in *Iqbal*'s wake is unworthy of this Court's attention, it studiously avoids opining on that status. (Village Respondent's Brief in Opp. pp. 8-11).

The Village Respondent does advance arguments against the Court's settling *Olech*'s status. It argues, for instance, that Petitioners' logic would "essentially mean that the Court should separately determine the effect of the pleading requirement of *Twombly* and *Iqbal* for each substantive area of law and presumably each statutory cause of action." (Village Respondent's Brief in Opp. p. 10). Never mind that Petitioner urges clarification as to a single decision that expressly addresses pleading requirements attending enforcement of a constitutional provision unsurpassed in safeguarding individual rights. Never mind that *Iqbal* prescribes application of Rule 8 pleading requirements as "context-specific," not "trial-case-specific," thus making way for the Court's bringing to bear its own considerable "judicial experience and common sense," *Iqbal*, 129 S.Ct. at 1950, on case categories it deems distinctive in nature or importance.

The Village Respondent advances arguments against this Court's settling *Olech*'s status. But with none of them does the Village Respondent

dare assert outright that *Olech* stands or that *Olech* has been upended.*

In sum, the Town Respondents hold one view of *Olech*'s status, while the Village Respondent holds another. The Town Respondents commit to a position: *Olech* is dead. The Village Respondent hedges; it is agnostic, unable to stake a position (while adverse to guidance from this Court). The divergence between the Town Respondents and the Village Respondent itself cries out for this Court's clarifying intervention.

Dated: November 12, 2010

Respectfully submitted,

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* Nor does the Village Respondent begin to account for *Ruston*'s reliance on *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2nd Cir. 2006). The Village Respondent, citing and excerpting *Ruston*, 610 F.3d 55, 59-60, underscores that reliance. (Village Respondent's Brief in Opp. pp. 6-7). Yet neither the Village Respondent nor the Town Respondents ever dispel the impression that *Ruston* evinced post-*Iqbal* confusion by drawing on *Clubside*, a summary judgment case, to affirm a district court's Fed.R.Civ.P. 12(b)(6) dismissal.

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